

ACT CIVIL & ADMINISTRATIVE TRIBUNAL

BOTTRILL v SUNOL & ANOR (Discrimination) [2017] ACAT 81

DT 4/2017

Catchwords: **DISCRIMINATION** – vilification – religious conviction – constitutional law – whether resolving a complaint by an ACT resident against a NSW resident involves the exercise of Commonwealth judicial power – it does not – geographical jurisdiction of ACAT – whether obtaining access in the ACT to internet material posted outside the ACT may be conduct in the ACT – whether material that may incite hatred toward, revulsion of, serious contempt for or serious ridicule of an ACT resident on the ground of religious conviction may be unlawful in the ACT where it was posted on a website of a NSW resident and downloaded in the ACT – it may

Legislation cited: *ACT Civil and Administrative Tribunal Act 2008* ss 15, 16, 22
Anti-Discrimination Act 1991 (Qld) ss 117, 118, 119, 120
Australian Capital Territory (Self Government) Act 1988 (Cth) s 22
Australian Constitution s 75(iv)
Court Procedures Act 2006 s 27
Discrimination Act 1991 s 67A
Human Rights Act 2004 ss 4AA, 8, 16, 21, 30
Human Rights Commission Act 2005 ss 53A, 53E
Legislation Act 2001 ss 122, 129
Magistrates Court Act 1930 s 262
Racial and Religious Tolerance Act 2001 (Vic) ss 7, 8, 12
Racial Discrimination Act 1975 (Cth) s 18C

Cases cited: *Baxter v Air New Zealand (Australia) Pty Ltd (Anti-Discrimination)* [2012] VCAT 1666
Brownlie v State Pollution Control Commission (1992) 27 NSWLR 78
Burns v Corbett; Gaynor v Burns [2017] NSWCA 3
Burns v Gaynor [2015] NSWCATAD 211
Collier v Sunol [2005] NSWADT 261
Corbett v Burns [2014] NSWCATAP 42
Dempster v National Companies and Securities Commission [1993] 10 ASCR 297
Dow Jones and Company Inc v Gutnick (2002) 210 CLR 575

Gindy & Chief Minister & ACT Government and Ors [2011] ACAT 67
Gluyas v Google Inc (Anti-Discrimination) [2010] VCAT 540
In the matter of an application for bail by Isa Islam [2010] ACTSC 147
Jausnik v The Nominal Defendant (No 5) [2016] ACTSC 306
Jones v Toben [2002] FCA 1150
Jones v Trad [2013] NSWCA 389
Jumbunna Coal Mines.NL v Victorian Coal Miners' Association (1908) 6 CLR 309
Kumagai Gumi Co Ltd v Commissioner of Taxation [1999] FCA 235
Lipohar v The Queen [1999] HCA 65
212 Northbourne Pty Limited v ACT Heritage Council & Anor [2016] ACAT 30
Piscioneri v Brisciani [2015] ACTSC 106
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355
Queen v Holliday [2017] HCA 35
R v Arthur Fearnside [2009] ACTCA 3
Re Iskar; Ex Parte Mercantile Transport Co Pty Ltd [1963] SR (NSW) 538
Scott v Bowden [2002] HCA 60; (2002) 194 ALR 593
Sunol v Collier (No 2) [2012] NSWCA 44
Toben v Jones [2003] FCAFC 137
Union Steamship Co. of Australia Pty Ltd v King (1988) 166 CLR 1

Tribunal: Senior Member B Meagher SC

Date of Orders: 9 October 2017

Date of Reasons for Decision: 9 October 2017

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) DT 4/2017

BETWEEN:

DAVID BOTTRIL
Applicant

AND:

JOHN SUNOL
Respondent

ATTORNEY-GENERAL FOR THE ACT
Party Joined

TRIBUNAL: Senior Member B Meagher SC

DATE: 9 October 2017

ORDER

The Tribunal orders that:

- 1 The application by the respondent challenging the jurisdiction of the Tribunal is dismissed.
- 2 The matter is to be relisted on a date to be fixed for further directions and the parties may attend by telephone.

.....
Senior Member B Meagher SC

REASONS FOR DECISION

Background

1. On 19 January 2017, David Bottrill, an ACT resident, made a complaint to the ACT Human Rights Commission against John Sunol, a resident of NSW. He complained that he was discriminated against by conduct that was directly or indirectly because of his religious conviction, being his membership of “OTO” (later described as Ordo Templi Orientis). In the complaint form, that he completed, he said “yes” to the question whether it happened in the ACT or was done by an ACT organisation. The complaint was that Mr Sunol operated a number of blog pages with the web address that included his name, on which are published publicly viewable materials which vilify Mr Bottrill on the ground of his religious conviction. The materials were attached to the complaint and, as he said, contain pictures of him and a number of extremely derogatory comments concerning him and OTO and identified him as a member. The attachments indicate they were printed from the web address referred to.
2. The complaint was referred to the ACT Civil and Administrative Tribunal (ACAT) under section 53A of the *Human Rights Commission Act 2005*.
3. In the complaint Mr Bottrill said he wanted the materials removed; that Mr Sunol be required not to publish any further materials of this nature; and that Mr Sunol issue an apology.

The arguments arising

4. Mr Sunol has raised a number of points in communications with the Tribunal and in written submissions, which he filed after a direction. He says the blog was posted by another man, who lives in Hanoi, Vietnam. That man, he says, had access to the blog site. Initially Mr Sunol was not sure he could get the blog removed and mentioned that the server was Google and was in the United States of America. In any event, he has since managed to take down the post and has closed the webpage. Mr Bottrill has confirmed that this occurred, but is concerned that there are other sites that are publishing similar material and asserts that Mr Sunol has assisted in this.

5. Mr Sunol also refers to the NSW Court of Appeal case of *Burns v Corbett*; *Gaynor v Burns* [2017] NSWCA 3 (***Burns v Corbett***). Special leave to appeal that decision in the High Court of Australia has been granted. No hearing date is¹ yet known for the appeal. The case decided that the NSW Civil and Administrative Tribunal (NCAT) was not authorised to decide the complaints about vilification of homosexuals where the complainant was a resident in NSW and the other parties were residents of other Australian states. The reasons are quite lengthy. In short, NCAT was not a court; the resolution of the complaint involved the exercise of judicial power; the judicial power was Commonwealth power under Chapter III of the Australian Constitution because it was a dispute between the residents of different states under section 75(iv) of the Constitution, and it was not permissible for such power to be exercised other than by a Court.
6. Mr Sunol also question whether the ACT had geographical jurisdiction since the post was outside the ACT and was by a non-ACT resident.
7. In his oral submissions at the hearing, Mr Sunol also raised the issue of whether the vilification provision was invalid as offending the implied right of free speech on such matters. No argument was developed about that and this decision does not resolve any such assertion. It should be noted, however, in case it is to be pursued, that in the ACT the *Human Rights Act 2004* section 16 would also be relevant. It might also be noted that there have been numerous arguments put about this proposition in other jurisdictions, so far without success. They include a case involving Mr Sunol.²

The Tribunal proceedings so far

8. A number of directions were made but, because of the preliminary jurisdiction points, a hearing was fixed for 27 July 2017 to deal with any preliminary jurisdictional points. The Attorney-General for the ACT had indicated he was considering intervening under section 27 of the *Court Procedures Act 2006*³ and has since done so. He had provided a short submission in writing.

¹ The Attorney-General of the ACT has intervened in this matter and has indicated that the hearing date is expected to be in October 2017

² *Sunol v Collier (No 2)* [2012] NSWCA 44

³ which applies to ACAT

Legislation

9. Following are some of the relevant provisions:

Human Rights Commission Act 2005

53A Referral of discrimination complaints

- (1) *This section applies if—*
 - (a) *either—*
 - (i) *a complainant is given a discrimination referral statement under section 45 (2) (d); or*
 - (ii) *a statement under section 82 (1) is included in a final report in relation to a complaint; and*
 - (b) *within 60 days after the statement is given, the complainant requires the commission to refer the complaint to the ACAT.*
- (2) *The commission must—*
 - (a) *refer the complaint to the ACAT; and*
 - (b) *tell the complainant and the person complained about in writing about the referral.*

Discrimination Act 1991

67A Unlawful vilification

- (1) *It is unlawful for a person to incite hatred toward, revulsion of, serious contempt for, or severe ridicule of a person or group of people on the ground of any of the following, other than in private:*
 - (a) *disability;*
 - (b) *gender identity;*
 - (c) *HIV/AIDS status;*
 - (d) *intersex status;*
 - (e) *race;*
 - (f) *religious conviction;*
 - (g) *sexuality.*

Examples—other than in private

- 1 screening recorded material at an event that is open to the public, even if privately organised
- 2 writing a publicly viewable post on social media
- 3 speaking in an interview intended to be broadcast or published
- 4 actions or gestures observable by the public
- 5 wearing or displaying clothes, signs or flags observable by the public

Note 1 Serious vilification is an offence under the Criminal Code, s 750.

Note 2 An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

(2) However, it is not unlawful to—

- (a) make a fair report about an act mentioned in subsection (1); or
- (b) communicate, distribute or disseminate any matter consisting of a publication that is subject to a defence of absolute privilege in a proceeding for defamation; or
- (c) do an act mentioned in subsection (1) reasonably and honestly, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and presentations of any matter.

ACT Civil and Administrative Tribunal Act 2008

16.... Civil dispute application means an application that consists of 1 or more of the following applications:

- (a) a contract application;
- (b) a damages application;
- (c) a debt application;
- (d) a goods application;
- (e) a nuisance application;
- (f) a trespass application;

- (g) *an application for a debt declaration;*
- (h) *an application for a common boundaries determination;*
- (i) *an application for an order under the Australian Consumer Law (ACT);*
- (j) *an application stated to be a civil dispute application in an authorising law.*

15...damages application means an application for damages for negligence or for any other tort except nuisance or trespass.

22 Tribunal jurisdiction and powers of Magistrates Court

- (1) *The tribunal has, in relation to civil dispute applications, the same jurisdiction and powers as the Magistrates Court has under the Magistrates Court Act 1930, part 4.2 (Civil jurisdiction).*

Magistrates Court Act 1930

262 Cause of action arising, or defendant resident, outside ACT

The Magistrates Court has jurisdiction to hear and decide a proceeding if—

- (a) *the defendant was resident in the ACT when the claim was served on the defendant, even though all of the cause of action in the proceeding arose outside the ACT; or*
- (b) *both of the following apply, even though the defendant is not in the ACT:*
 - (i) *a material part of the cause of action in the proceeding arose in the ACT, even though part of the cause of action arose outside the ACT;*
 - (ii) *the claim is served on the defendant in Australia or an external territory.*

- 10. It should be noted that section 67A of the *Discrimination Act 1991* (the **Discrimination Act**) was amended in 2016 to delete a reference to the conduct being a ‘public act’ and replaced it with being other than in private. In some other jurisdictions, the term ‘public act’ is still used.

Submissions

The Constitutional Argument – is the Tribunal exercising Federal judicial power?

- 11. Mr Bottrill argued that ACAT was court and that section 75 (iv) of the Constitution did not apply to cases involving a resident of a Territory. The ACT

Attorney-General appeared as an intervener and confined his argument to the latter point. Mr Sunol did not develop his argument and suggests the case be further adjourned so he could get a constitutional lawyer. No information as to whether this was likely or why it had not already occurred was given. However, it was clear he relied on the NSW Court of Appeal decision in *Burns v Corbett*.

The geographical jurisdiction point

12. Mr Bottrill sought to rely on the civil dispute provisions of the *ACT Civil and Administrative Tribunal Act 2008*.
13. The Attorney-General suggested that it could be dealt with in the normal way during the substantive hearing. Ms Tarbet, who appeared for the Attorney-General, helpfully drew attention to the fact that the respondent to the High Court Appeal in *Burns v Corbett* had raised this point by way of notice of contention. She asked that this decision be deferred until the High Court had decided the case. Ms Tarbet also drew attention to the amendment to delete 'public act' from the Discrimination Act. She did not submit there was such geographical jurisdiction.
14. Mr Bottrill opposed an adjournment until the High Court case was decided as it could be many months.
15. I indicated that I had formed the view that the Federal judicial power argument was not reasonably tenable and therefore would not further delay the matter to allow Mr Sunol even more time to get a constitutional lawyer. I indicated that I had found the geographical jurisdiction issue very unclear but that it should not be put off to be dealt with at the substantive hearing as it affected jurisdiction; it was a very important point affecting public administration in the ACT and I would be greatly assisted for any submissions the Attorney-General might give. For those reasons, I reserved my decision and asked the parties to make further written submissions about that point and, if thought important, the argument that the question be further adjourned. I made directions accordingly.
16. Because of the possibility that the case could be deferred, I asked Mr Sunol if he was prepared to agree to an order that he not cause further posts of this nature to

be made, so long as the order was qualified by his capacity to control the conduct. He agreed and such an order was made.

Further submissions

17. During the period allowed for submissions, the Tribunal was asked for leave by the ACT Discrimination Commissioner (the Commissioner) to make written submissions as an *amicus curiae* about the geographical jurisdiction issue. She correctly pointed out that the issue was bigger than the interests of the parties, and raised a significant issue about the administration of the ACT vilification provisions where there was an interstate element. Leave was given to the Commissioner and the other parties, and the Attorney-General were notified.
18. The Tribunal has since received written submissions from the Attorney-General and from the Commissioner and replies from them to each other's submissions. The parties are both self-represented and do not have legal qualifications, but they have provided some further submission also. Interestingly, the Attorney-General submitted that the Tribunal does not have jurisdiction but the Commissioner submitted it does. There was, therefore, a legally qualified contradicter and the Tribunal is grateful for the assistance. The submissions were detailed, thoughtful and helpful.

The Attorney-General's submissions

19. Firstly, it was submitted that the matter should be adjourned to await the High Court decision. Secondly, it was submitted that, properly construed, section 67A of the Discrimination Act does not apply to this case.
20. Mr Bottrill had opposed an adjournment of the hearing as it would delay the matter for an unknown and potentially lengthy period. Apart from the suggestion by Mr Sunol that he might get a constitutional lawyer involved – something that has not happened in the period for submissions – there were no other submissions about this issue.
21. The Attorney-General submitted that there would be no prejudice by adjourning the matter and believed that the adjournment would not be lengthy. The absence of prejudice was because the offending blog had been removed. At the hearing Mr Bottrill said that there were ongoing issues on other websites and he blamed

the Mr Sunol for them. The Attorney correctly submitted that question was without binding precedent, was a finely balanced decision and any pronouncement by the High Court would be worth waiting for.

22. In respect of the geographical jurisdiction point, the Attorney-General referred to the well-known principles of statutory construction. He pointed out that the legal meaning will ordinarily correspond with the grammatical meaning, having regard to the purpose of the provision and the object and scope of the provision as a whole.⁴ Reference was also made to Part 14.2 of the *Legislation Act 2001*.
23. Reference was made to the objects of the Discrimination Act to remove discrimination relating to certain attributes such as sexuality, relationship status and, by a recent amendment, religion. Attention was drawn to the change of language to ‘other than in private’ rather than ‘a public act’.
24. It was submitted that section 67A was akin to a statutory cause of action and cases were cited in support of that proposition. It was also likened to a statutory tort.
25. It was pointed out that the term ‘incite’ was not defined, and reference was made to cases where definitions were given. In *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207 at [13] (***Catch the Fire***) and *Sunol v Collier (No 2)* [2012] NSWCA 44 at [26] it was said that it means “rouse, to stimulate, to urge, to spur on, to stir up, to animate” or to “command, request, propose, advise or encourage.”
26. It was said that it was not necessary that someone was in fact incited by the words of the publication.⁵ It was not necessary to establish that the offending person had the intention to incite, and it was to be established objectively by asking whether the natural or ordinary effect of the conduct is to incite.⁶ At [129] in *Catch the Fire*, Nettle JA said the circumstances of the case include the characteristics of the audience and social historical context.

⁴ Citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [41], [78], [93] and [69], [19]

⁵ *Jones v Trad* [2013] NSWCA 389 at [50]

⁶ *Catch the Fire* at [19]

27. At paragraph 43 of his submission, the Attorney-General formulated the question to be decided here. It was pointed out that the Discrimination Act expressly contemplated that writing a public viewable post on social media or the internet may constitute unlawful vilification. This must be a reference to the example of an act that was otherwise than in private referred to in the Act. By way of comment it might be then argued that therefore the unlawful conduct occurred on posting and that was not in the ACT. An alternative approach is to say that it still left unanswered whether the posting was incitement if no one read it. This issue was discussed in *Jones v Toben* [2002] FCA 1150 at [73] (*Jones*) where Justice Branson said:

*In my view, the placing of material, whether text, graphics, audio or video, on a website which is not password protected is an act which causes words, sounds, images or writing to be communicated to the public in the sense that they are communicated to any person who utilises a browser to gain access to that website... I conclude that the placing of material on a website which is not password protected is an act which, for the purposes of the [Racial Discrimination Act], is taken not to be done in private... I further conclude that the act of placing text and graphics on a website which is not password protected is an act of publication, or perhaps **more accurately an act which causes repeated publication**, in that it allows individuals who access the website with a browser to read that text and see those graphics.(my emphasis; footnotes omitted)*

28. The Attorney-General submitted that the Discrimination Act is subject to the presumption that legislation regulates conduct within and only within, the geographical limits of the Territory.⁷ This is consistent with section 122(1)(a) of the *Legislation Act 2001*.
29. The presumption is said to be rebuttable and an Act may be held to have extraterritorial effect if there is a connection between the extraterritorial events persons or things and the enacting state.⁸ There the question was whether the law was invalid as it was expressed to operate extraterritorially. It was explained that “the power to make laws for the peace order and good government of the Territory”⁹ were wide indeed.

⁷ *Jumbunna Coal Mines.NL v Victorian Coal Miners Association* (1908) 6CLR 309, 363

⁸ *Union Steamship Co. of Australia Pty Ltd v King* (1988) 166 CLR 1, 14

⁹ These are the words in section 22 of the *Australian Capital Territory (Self Government) Act 1988* (Cth)

30. The submission also referred to *Lipohar v The Queen* [1999] HCA 65. There the issue related to a crime. At [18] Gleeson CJ said:

Where a crime is created by statute, which normally describes the crime without making any particular reference to territorial locality, and where the nature of the crime is such that elements may occur in a number of territories, the resolution of questions of jurisdiction and justiciability may involve both questions of statutory construction, and the application of common law principles according to which courts decide where, out of a number of competing possibilities, a crime has been committed.

31. Reference is also made to *Re Iskar; Ex Parte Mercantile Transport Co Pty Ltd* [1963] SR (NSW) 538 as supporting the proposition that there needs to be a clear intention to rebut a presumption that the section does not operate extraterritorially. Also, reference was made to a more recent case of *Kumagai Gumi Co Ltd v Commissioner of Taxation* [1999] FCA 235 at [41]-[43]. There it was said:

*as a matter of interpretation, laws of a sovereign legislature should be interpreted, where possible, so as not to give them an extraterritorial operation. More precisely, it may be said that legislation, be it of the United Kingdom Parliament, the Commonwealth Parliament or a State, where expressed in general words, will be construed so as to confine those general words to operate in accordance with the generally accepted principles of nations, and not so as to operate extraterritorially: *Barcello v Electolytic Zinc Co of Australasia Ltd* [1932] HCA 52; (1932) 48 CLR 391 and cf *Pearce and Geddes: Statutory Interpretation in Australia* (4th ed at 130-2).*

That there is such a rule of interpretation may for present purposes be accepted. The application of it must however, depend upon the context of the legislation, the legislative purpose and the construction of the statute as a whole. It is said that the principle requires s 163 of the Act to be read down so that it is taken not to apply to foreigners and foreign matters outside Australia and external territories to which it extends. That section relevantly provides that the Act is to extend, subject to a contrary intention, to acts matters and things outside Australia and whether or not in a foreign country. It is not clear to me that s 163 should be read down in accordance with some principle of interpretation. Section 163 is not expressed in general language in the sense that those words are used above in describing the principle. But the submission would do violence, not merely to the context of the legislation, but the legislative scheme itself.

32. The Attorney-General also drew attention to a statement that the presumption would not be so strong in respect of interstate matters as opposed to international matters.¹⁰
33. The Attorney argued that there was power for the ACT to enact a law that did proscribe an interstate act if it had an ACT connection but that section 67A of the Discrimination Act did not do so expressly and so should be presumed not to so operate unless it was clear that it was intended to.
34. The question of whether a contrary intention was manifest was then considered. No ACT authority on point was located. There was such an intention evident in sections 7 and 8 of the *Racial and Religious Tolerance Act 2001* (Vic) where there is express reference to the prohibited conduct occurring in or outside Victoria.
35. It is conceded that there is an argument that the unlawfulness or mischief that is being targeted is the outcome of the posting. It is the incitement itself, not the method of its communication, that is being addressed.
36. Reference is made to *Dow Jones and Company Inc v Gutnick* (2002) 210 CLR 575 (**Gutnick**) where a resident of Victoria was held to have been defamed by a post in the USA that was downloaded in Victoria. There the Court said at [40]:

Because publication is an act or event to which there are at least two parties, the publisher and a person to whom material is published, publication to numerous persons may have as many territorial connections as there are those to whom particular words are published. It is only if one starts from a premise that the publication of particular words is necessarily a singular event which is to be located by reference only to the conduct of the publisher that it would be right to attach no significance to the territorial connections provided by the several places in which the publication is available for comprehension.

37. The tort of defamation requires there to be a publication to someone for it to be actionable and therefore the place of publication is where the cause of action arises. *Gutnick* was followed in the ACT in *Piscioneri v Brisciani* [2015] ACTSC 106.

¹⁰ *Dempster v National Companies and Securities Commission* (1993) 10 ASCR 297, 320

38. The Attorney-General referred to *Corbett v Burns* [2014] NSWCATAP 42. There an appeal panel of the NCAT dismissed an appeal by the person who had vilified homosexuals. The remarks that vilified homosexuals were made in Victoria about the complainant who was in NSW. The remarks were published in a newspaper in Victoria but were also posted on line. It was found that, apart from the Victorian printed story, the republished remarks were public acts in NSW and were therefore within the jurisdiction. Reference was made to *Gutnick*. *Corbett v Burns* is an earlier case between the same parties in the dispute that is now in the High Court. The argument seems not to have been developed because of the way the matter was run at first instance but it was assumed that if an audience in NSW was available for the public acts there was jurisdiction.
39. Next, reference is made to *Gluyas v Google Inc (Anti-Discrimination)* [2010] VCAT 540 at [37] as holding that there may be such extra territorial jurisdiction. A fair reading of the case would tend to point the other way. Also mentioned is *Baxter v Air New Zealand (Australia) Pty Ltd (Anti-Discrimination)* [2012] VCAT 1666 at [35]. It turned on where an instantaneous communication occurred and gives no support to the argument that there is jurisdiction here.
40. Reference is made to result offences¹¹ such as *Brownlie v State Pollution Control Commission* (1992) 27 NSWLR 78 where the acts causing the pollution occurred in Queensland but the water polluted was in NSW.
41. Finally, the Attorney-General submitted that while the contrary was arguable, the better construction was that there was no extraterritorial jurisdiction. He referred to *Gaynor v Burns* [2015] NSWCATAD 211 where it was found that there was no jurisdiction. There a posting in Queensland of vilification material was made by the respondent about the complainant who was in NSW. The tribunal member said at [17]:

In my opinion, there was no relevant public act by Mr Gaynor in NSW. His acts of posting material on his computer were public acts but they took place in Queensland. It was the separate act of Mr Burns himself, not of

¹¹ Meaning it is the result that makes the conduct unlawful

Mr Gaynor, which caused the material to be downloaded in NSW. As it happened Mr Gaynor lived in Queensland not far from the NSW border. However, if Mr Burns' argument is correct, a person who never leaves a country which permits (or even encourages) the publication of material vilifying homosexuals and who uploads vilifying material on his computer could be held liable to pay damages under the Act to a complainant if such complainant, or someone else, downloads the material in NSW. This would be so even though the complainant was not known to the uploader and was identified only by reference to a very large class of persons to which the complainant claimed to be a member. In my opinion, such a circumstance is beyond the reach of the NSW Parliament.

42. Reference was made in the case to *Collier v Sunol*¹² [2005] NSWADT 261 (*Collier*) and Gutnick.
43. In *Collier*, there was no issue about extraterritoriality but in deciding what was a public act the Tribunal contemplated that the public act was also in other jurisdictions. The following was said at [34] and [35]:

In Jones v Toben [2002] FCA 1150, the Federal Court held that posting material on a site of this nature was an act 'not done in private' for the purposes of the vilification provisions of the Racial Discrimination Act 1975 (Cth). Section 18C(2) of this Act states that 'an act is taken not to be done in public¹³ if it... causes words, sounds, images or writing to be communicated to the public...' At [73 – 75], (Here they quoted the words already set out in this decision)

*We would add that the 'public act' of communicating the relevant material to the public via the internet clearly occurred in New South Wales, **if not also in other jurisdictions**. This was the State in which Mr Collier read and printed out all this material. The evidence shows any other person in New South Wales who used a browser to gain access to the relevant websites could do likewise. While dealing with a different cause of action (defamation), the principles stated by the High Court in Dow Jones & Co Inc v Gutnick [2002] HCA 56 appear to us to be applicable. (my emphasis)*

44. It was submitted by the Attorney-General that if the conduct was akin to a statutory tort then the choice of law rules that apply to such torts would prevail. Reference was made to *Jausnik v The Nominal Defendant (No 5)* [2016] ACTSC 306 at [90]-[100].

¹² The same person as the respondent in this case

¹³ It should read 'private'

45. It is said, in conclusion, that the orthodox view should be preferred and that was not to infer extraterritorial application in the absence of express language or a clear contrary intention.

The applicant's submissions

46. Mr Bottrill referred to some very old criminal cases that required a communication to an intended audience for there to be an incitement. A recent criminal case considers the word incitement in a different context¹⁴. Mr Bottrill observed that there needed to be two actors, the author and the recipient. He referred to *Jones, Toben v Jones* [2003] FAFC 137¹⁵ and *Gutnick*. He referred to some international materials that appear to be too remote from the issue here. He asserted that the intention was to reach as wide an audience as possible including in the ACT and that the incitement did occur in the ACT.

The respondent's submissions

47. Mr Sunol said he had no new matters to raise but summarised his arguments as:
- (a) Jurisdiction. He is not an ACT resident but a NSW resident.
 - (b) He didn't write it and was not responsible for the blog. This is not being decided here and will be an issue if there is jurisdiction.
 - (c) The OTO is not a religion. Again, this will be a matter for evidence if the matter can proceed.
 - (d) He has deleted the postings and ceased any contact with the author but will not apologise.

The Discrimination Commissioner's submissions

48. Reference is made to section 30 of the *Human Rights Act 2004* (**Human Rights Act**). It provides

So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.

¹⁴ In *Queen v Holliday* [2017] HCA 35 an offence of incitement occurred when the accused urged the commission of an offence by another. The urging was in a conversation. The accused succeeded because the conduct urged was not an offence. It is in a different context but it seems there would have to have been a person who received the communication

¹⁵ There is nothing in the appeal that affects what Justice Branson had said at first instance

49. The rights identified as being relevant are set out in section 8 (right to equality and non-discrimination), section 14 (freedom of religion), and section 21 (right to a fair hearing).
50. Some of the cases that try and explain section 30 include the thoughtful and interesting decision of Justice Penfold of *In the matter of an application for bail by Isa Islam* [2010] ACTSC 147 (*Islam*). The Federal Law Report reference is given. The authorised report citation is (2010) 4 ACTLR 235.¹⁶ There are other cases¹⁷ that differ in some respects from the *Islam* approach. This is not the occasion to sort through them all, but the general point is that the purpose of the section and the Act, as a whole, needs to be identified and where it is, as here, one aimed at protecting human rights a construction that is available that best achieves that object is to be preferred.¹⁸ That is not quite the way the submission is put. It asserts that, if it is possible consistently with the purposes of the Discrimination Act and in accordance with ordinary rules of statutory rules of interpretation to interpret section 67A as encompassing conduct not wholly occurring in the ACT where not to do so would result in the Act operating in a way that unreasonably limits human rights, then that interpretation should be preferred.
51. The objects of the Act in section 4 are then set out as follows:

Objects of Act

The objects of this Act are—

- (a) *to eliminate discrimination to the greatest extent possible; and*
- (b) *to promote and protect the right to equality before the law under the Human Rights Act 2004 including—*
 - (i) *the right to enjoy a person's human rights without distinction or discrimination of any kind; and*
 - (ii) *the right to the equal protection of the law without discrimination; and*
 - (iii) *the right to equal and effective protection against discrimination on any ground; and*

¹⁶ This was the citation given in the Commissioner's submissions in reply

¹⁷ In particular, *R v Fearnside* [2009] ACTCA 3; [2009] 3 ACTLR 25 at [76]- [104]

¹⁸ Usually there are many purposes and the section may have a purpose that is separate again from the Discrimination Act as a whole. Here the purpose of the Discrimination Act, as a whole is in fact to advance human rights and there is no competing purpose. Therefore, the problems that Penfold J identified do not arise

- (c) *to encourage the identification and elimination of systemic causes of discrimination*
- (d) *to promote and facilitate the progressive recognizing of equality, as far as reasonably practicable, by recognizing that—*
 - (i) *discrimination can cause social and economic disadvantage and that access opportunities are not equitably distributed throughout society; and*
 - (ii) *equal application of a rule to different groups can have unequal results or outcomes; and*
 - (iii) *the achievement of substantive equality may require the making of reasonable adjustments, reasonable accommodation and the taking of special measures.*

52. In addition, there is now section 4AA of the Discrimination Act that reinforces the section 30 of the Human Rights Act approach. It provides:

Interpretation beneficial to people with protected attributes

This Act must be interpreted in a way that is beneficial to a person who has a protected attribute, to the extent it is possible to do so consistently with—

- (a) *the objects of this Act; and*
- (b) *human rights under the Human Rights Act 2004*

Note The Legislation Act s 139 (1) (which is about interpreting legislation to be consistent with its purpose) and the Human Rights Act 2004, s 30 (which is about interpreting legislation to be consistent with human rights) are also relevant to interpreting territory laws.

53. The submission explains the background to these sections and as is clear from their content they were intended to assist in interpretation of the Discrimination Act and the promotion of human rights. By way of comment, clearly the purpose of the Act is the protection of those persons that have the protected attributes. To the extent that it is necessary to limit the Discrimination Act by territoriality, the purpose is to protect such persons that are ACT residents or who are vilified here. Clearly the legislature would expect that there were people with those attributes in the ACT. Here an ACT resident is named. These matters point to the section being results focussed.

54. The change from a public act to ‘other than in private’ was also recommended as it would ensure that there was less doubt about what was caught. Generally, this would widen the ambit of what might be regarded as vilification. It is also

used in the Commonwealth *Racial Discrimination Act 1975* (Cth) section 18C, the Victorian *Racial and Religious Tolerance Act 2001* section 12 of the Queensland *Anti-Discrimination Act 1991* sections 117-120.

55. Next it was submitted that the posting on the internet is a non-private act. Reference is made to the speech of the Minister when introducing the amendment and he clearly contemplated that posting on the internet was. Reference is also made to *Jones and Collier v Sunol*.¹⁹
56. The Commissioner accepts the proposition that there is not an extra territorial application unless it is express or necessarily implied. She also agrees that there is no express application.
57. Next reference is made to the ambiguity arising from *Burns v Gaynor* and *Corbett v Burns* already mentioned above. She noted too that in *Burns v Gaynor* the NCAT Appeals Tribunal said that *Gutnick* should be distinguished, but in *Collier v Sunol* it thought it was apposite. Reference was also made to *Gluyas v Google Inc* and *Baxter v Air New Zealand* also discussed above. Also cited were other Victorian Civil and Administrative Tribunal (VCAT) cases that allowed the possibility that some of the conduct might be extraterritorial so long as there was a Victorian connection. These cases are not apposite but are not inconsistent with an argument that there is jurisdiction here.
58. The Commissioner argues that there is geographical jurisdiction if the information is published in the ACT as in *Gutnick*. She postulated three possible outcomes but accepts that two of them would not be available as it would amount to legislating extraterritorially or be unduly restrictive. She argues that the interpretation that is available and best achieves the goal in section 30 of the Human Rights Act and section 4AA of the Discrimination Act is:

...

- (ii) *The Tribunal has authority to handle a vilification complaint, where the act of posting material which is accessed in the ACT, occurs either (a) in the ACT or (b) is connected by the facts and*

¹⁹ These cases have been described already and are clearly authority for the submission

*circumstances with the ACT –the relevant relationship in (b) means that the material is published in the ACT.*²⁰

The Attorney-General’s reply

59. The Attorney-General argues that the principles of construction are not displaced by section 30 of the Human Rights Act, and section 67A of the Discrimination Act is aimed at the posting not the publication. He also argues that the objects of protecting human rights are still met by his interpretation. In addition, he says there are appropriate remedies in the states where the posting occurs.

The Commissioner’s reply

60. As aspects of the reply persuade me how to resolve this difficult problem, I attach these submissions to the reasons and will not paraphrase them here. I note too that there are not available remedies in NSW in respect of religious vilification.

Consideration

The Constitutional argument – Is the Tribunal exercising Federal judicial power?

61. I indicated at the hearing that I did not think the NSW Court of Appeal decision in *Burns v Corbett* affected this matter.
62. The short answer is that section 75(iv) of the Constitution does not apply to the Territories. This was explained by Justice McHugh in *Scott v Bowden* [2002] HCA 60 at [14] where he said:

There is no substance in the contention of the plaintiffs that the other defendants are also within the diversity jurisdiction of this Court because they are residents of the Northern Territory which, the plaintiffs allege, is a constitutional State for the purposes of s 75(iv) of the Constitution. The Constitution draws a clear distinction between States and Territories, and Territories are not mentioned in s 75(iv). Until the grant of self-government, the Territories were subject to federal law or federal control and ultimately still are. And, as a matter of history, when the Constitution was enacted, the settled doctrine of the United States courts was that the federal courts had no jurisdiction in cases concerning a resident of a State and a resident of a Territory.

²⁰ Submissions of the ACT Discrimination Commissioner as Amicus Curiae at [39]

63. Further Associate Justice Mossop (as he then was) said in *Jausnik v The Nominal Defendant* (No 5) [2016] ACTSC 306 at [85]

*..., the matter was said to be in federal jurisdiction because the Nominal Defendant was a resident of the ACT and suing Mr Hannaford (presumed to be a resident of NSW) and hence within the scope of s 75(iv) of the Constitution. This contention could not be correct because the Nominal Defendant is not a “resident” of “a State”. That is because **the Australian Capital Territory is not a “State”** and because the Nominal Defendant is not a natural person and hence not a “resident” **for the purposes of s 75(iv):** *Crouch v Commissioner of Railways (Q)* [1985] HCA 69; (1985) 159 CLR 22; *British American Tobacco Australia Ltd v Western Australia* [2003] HCA 47; (2003) 217 CLR 30 at [37].(My emphasis)*

Adjournment

64. I do not think it is appropriate to adjourn the matter to an indefinite date to await a decision by the High Court in *Corbett v Burns*. Firstly, there is no clear date as to when that might be. Secondly, the High Court may well not deal with the point regarding extraterritoriality even if the respondent raised it. Thirdly, even if it does, the legislation in that case is not on all fours with this Act and may not determine the issue. In any event, the argument now raised is the equivalent of a strike out application and it ought not be struck out if the issue is arguable. The Attorney-General concedes that the issue is finely balanced and is clearly arguable. As a practical matter, I have some concerns as to what further relief might be ordered anyway and I will refer to these at the end of these reasons.

Geographical jurisdiction

65. In respect of geographical jurisdiction, the case is not a civil dispute as defined in section 16 of the *ACT Civil and Administrative Tribunal Act 2008*. The extraterritorial reach of section 262 of the *Magistrates Court Act 1930* is not available here. Any jurisdiction is derived from the legislation by which this dispute comes to be dealt with by the ACAT. There is a good explanation of the mechanics of this in *Gindy & Chief Minister & ACT Government and Ors* [2011] ACAT 67 where it was said:

The Tribunal regards complaints referred by the Commission under this section (s53A) as applications made to the Tribunal under section 9 of the ACT Civil and Administrative Tribunal Act 2008 (ACAT Act). The complainant becomes the applicant for the purposes of the proceedings before the tribunal. The person or entity complained about is the respondent.

66. There is no express provision in the *Discrimination Act 1991* about extraterritoriality.
67. There is a common law presumption against it.²¹ This is common ground between the Attorney-General and the Commissioner. I agree with the submissions of the Attorney-General that it is necessary to find a statutory intention to operate extraterritorially. The ACT has the power to make laws that have an extraterritorial application so long as there is a Territory connection.
68. The question in the original application to the Human Rights Commission asking about an ACT connection seems reasonable but may not address all the ways there is an ACT connection. It is common ground that the respondent is not an ACT resident. The question that remains is whether it is necessary for the complained of conduct to have occurred in the ACT or whether it can be argued that, properly construed, section 67A of the Discrimination Act will apply to conduct occurring outside the ACT in circumstances where the conduct takes effect in the ACT. In *Burns v Gaynor*, [2015] NSWCATAD 211 posting on the internet was held to have occurred in Queensland and thus there was no territorial jurisdiction because the conduct did not occur in NSW. There the expression ‘public act’ was used in the section dealing with vilification because of homosexuality.
69. The NCAT Appeal Tribunal held it had no jurisdiction because the Act did not extend to an act not in NSW. The reasons of that Tribunal at [17] have already been set out. As already explained reference was made in the case to *Collier* and *Gutnick*.
70. As already explained at [43], in *Collier v Sunol* there was no issue about extra territoriality but, in deciding what was a public act, it was contemplated that there may well be a public act in other jurisdictions where the internet post was read. This seems implicit in what was said by Justice Branson in *Jones* (see [27]). In both cases *Gutnick*²² was not distinguished.

²¹ In addition to the cases referred to by the Attorney-General there is some discussion of it in *Northbourne Pty Limited v ACT Heritage Council & Anor* [2016] ACAT 30

²² It was followed in the ACT in *Piscioneri v Brisciani* [2015] ACTSC 106

71. Section 67(1) uses the word ‘incite’. There seems no doubt that an act is not a private one where there is a posting of the offending article or it is not removed. The examples in the section say this. It could be argued that the examples do not define the word ‘incite’ but the non-private act and there is still some cause and effect necessary to amount to incitement. It is implicit in what is said in *Jones* that incitement also occurs when the web document is downloaded. The argument in *Burns v Gaynor* about it catching unsuspecting persons who are acting in accordance with the law of their own jurisdiction ignores that this would well happen in defamation cases too. In *Gutnick*²³, the High Court said that for there to be a publication there needs to be two persons, a publisher and a person to whom it is published. Here there are three actors. The person who posts the matter on the internet (or the person vicariously liable for it), the reader and the persons about whom the post was made. Equally, for there to be an incitement there must be two parties. ‘Incite’ is a transitive verb. It has a subject and an object. The object is the putative person to be incited. The fact that there is an unlawful act even before the post is read must be considered in the context that we would never know that this had happened unless someone read it.
72. What is more telling here is that the clear statutory purpose is to protect the persons that have the attributes that should not be vilified or be the subject of discrimination. Section 4AA of the Discrimination Act makes this very clear. In my opinion, even without resort to section 30 of the Human Rights Act and applying section 139 of the Legislation Act, the interpretation that must be preferred is the one that achieves the statutory purpose. Unlike the case in *Islam* where there was tension between freedom of the individual and protection of the public, here the object of the Discrimination Act as a whole and section 67A is to protect the persons who may be vilified.
73. In my opinion those persons are ACT residents. They may also be other persons if the post occurs in the ACT or if it is done elsewhere by an ACT resident, but I do not have to decide that here. Here the complainant, an ACT resident, is specifically identified.

²³ The problem of what is legal in one jurisdiction but defamatory in another was discussed but did not deter the Court from concluding that it was actionable where downloaded

74. An example that illustrates the mischief being addressed is where a NSW resident in NSW stands near the border of the ACT, and yells into a loudspeaker – so that it can be heard in the ACT – vilifying remarks about classes of people that reside in the ACT or, as here, the complainant. This conduct would surely be proscribed by section 67A. The internet is the equivalent of the loudspeaker.
75. What if the vilifier were to shout out hate speech in a forest and no one heard? He or she might be technically guilty of an unlawful act but we would never know. The Act must be taken to include the existence of a potential incitement and to proscribe conduct (not in private) where it becomes known. It is within the ACT jurisdiction so long as it vilifies ACT residents.
76. It follows that, in my opinion, given that the clear purpose of the Discrimination Act is to protect ACT residents with the attributes identified, section 67A must be construed to proscribe, among other things, a non-private act that vilifies an ACT resident where the vilifying material is read in the ACT or is available to be read here. There is thus a clear intention to operate to proscribe conduct that vilifies an ACT resident even though the non-private act of the respondent is in NSW, so long as the material is read or arguably is capable of being read, in the ACT.
77. Having said that, I recognise that there are some difficulties with this conclusion. The Commissioner argued that the Act should be read as “It is unlawful for a person **whether inside or outside the ACT** to incite hatred...**in the ACT** of a person... **in the ACT** on the ground of (religious conviction) other than in private.” This recognises that there are many elements in the section that may have territorial questions. The respondent may be a resident of another place. He or she might make a relevant non-private act in another state. The matter may be capable of being read in many states. The matter may be communicated to others when it is downloaded and they may be in another state. The person or group vilified may be in another state. When construing the section to accord with the general principle of non-extraterritoriality, it is necessary to read into the section somewhere the words ‘in the ACT’. That could be done by inserting the words immediately after ‘unlawful’ and nowhere else, and it would leave undetermined what that meant. If a necessary element is

that someone reads it (as in the defamation cases), then the incitement does not occur until that happens. It is not necessary that the reader is persuaded to hate the person²⁴ or group named only that he or she has been communicated with. There is support for the concept of it being communicated in the exemption in subsection 2(b).²⁵ The example of a post on social media is not exclusive and does not purport to define what constitutes incitement. It seems to me that even if incitement occurs by post alone, it does not exclude it being also constituted by being read. I prefer the construction that it must be communicated before there is incitement and if it is read in the ACT the incitement occurs here. One problem not addressed in the submissions was the prospect of multiple acts of incitement. In *Gutnick* this was discussed as there are multiple causes of action in a defamation case each time the defamation is published. I am not persuaded that this would matter in practice as it would be judged as one cause resulting in multiple consequences, and may affect penalty as in defamation circulation affects damages.

78. While that is my preferred construction, I recognise that it is not without doubt. If it wrong, I still think that the unlawful act is not exclusively constituted by the act of posting and it also occurs when communicated to a downloader. Justice Branson in *Jones* seems to have seen it that way. This approach could result in a wider operation than that advocated by the Commissioner because it may not require the words in the ACT be inferred twice. It is close to the third option in the Commissioner's primary submission. The Commissioner submitted that the construction could not be right as it would be impermissibly extraterritorial. I was not sure what that meant. The ACT can legislate about matters that involve extraterritorial matters so long as there is a sufficient connection with the ACT. Further on this interpretation, the act of incitement occurs in the ACT and is not extraterritorial. The fact that there may be power to do this does not mean that is what was done, however, on my preferred construction, it was.
79. In any event, the interpretation supported by the Commissioner is certainly available and addresses the mischief being remedied, obeys section 4AA of the Discrimination Act and limits the operation of the Act so that achieves its

²⁴ *Jones v Trad* [2013] NSWCA 389 at [50].

²⁵ (2) However, it is not unlawful to— (b) communicate,...

purpose with minimal extra territoriality. As I understand the submission, the words ‘in the ACT’ where they first occur are intended to require that there be a downloading in the ACT, but does not require an interpretation that this is necessary for the act of incitement to have been completed as I have suggested above. In my opinion, the section may well operate more widely than this. If I am wrong, this construction is correct as it protects persons in the ACT who are vilified on the ground of religious conviction and suffer that effect in the ACT. Otherwise, they would have no ACT protection and their ability to obtain redress elsewhere would depend on the unpredictable laws of other jurisdictions. The alternative approach advocated by the Attorney-General would not comply with section 139 of the Legislation Act or section 30 of the Human Rights Act.

Conclusion

80. There is geographical jurisdiction for the ACAT to deal with the case.

Remaining matters

81. There are still issues in the case which require evidence.

82. First, is the issue about the responsibility of Mr Sunol for the post or for it remaining there. In *Piscioneri v Brisciani* [2015] ACTSC 106 Burns J in a defamation case explained what was needed.²⁶

83. Second, the applicant must establish that OTO is a religion.

84. Third, it is not a defamation case and there is no assumption that the contents of the post are untrue. By saying that I am not suggesting that they are true. It may

²⁶ I think it is necessary for me to determine whether the defendant can be held liable for the matter published on ZGeek, given that much of the material complained of is written by people other than the defendant. Internet content hosts can, in some circumstances, be vicariously liable for matter published by others, by virtue of the failure to remove from public display defamatory material published by the third party. In order to be vicariously liable, the host must have failed to remove the material after being notified of its existence, and the host must be a publisher, as opposed to a mere passive facilitator of the material: see *Godfrey v Demon Internet* [2001] QB 201; *Bunt v Tilley* [2006] EWHC 407; [2006] 3 All ER 336. In this case, I note that the defendant personally authored some of the ZGeek posts, indeed he initiated the discussion regarding the plaintiff in 2005, and was the owner and administrator of the site ZGeek at all relevant times during which other users posted relevant material on the website. The defendant gave evidence that, as the administrator and owner of ZGeek, he had the ability to moderate and remove any content that was posted on ZGeek

not take much in the way of evidence from the applicant for the respondent to be required to defend the remarks.

85. Finally, given that Mr Sunol has taken down the offending post and has so far been amenable to an injunction not to enable further posts, there is not much left to resolve. Mr Bottrill wants an apology and section 53E of the Human Rights Commission Act enables an order that this be given. Mr Sunol has refused to give one as he has strong views about the OTO. It may be that if there is evidence about it from Mr Bottrill he might see the matter differently.
86. Mr Bottrill asserted that Mr Sunol was assisting other publications and he would want a wider injunction. There would need to be an amendment to the current application with particulars of such further incitements and evidence of them.
87. The matter will be relisted for directions about the further conduct of the matter. I am extremely grateful to Ms Tarbet and Ms Toohey for their thoughtful and well written submissions.

.....
Senior Member B Meagher SC

ANNEXURE A

In the ACT Civil & Administrative Tribunal

DT 4/2017

David Bottrill

and

John Sunol

ACT Attorney-General (Intervening)

SUPPLEMENTARY SUBMISSIONS OF THE ACT DISCRIMINATION COMMISSIONER (AMICUS CURIAE) IN RESPONSE TO THE SUBMISSIONS IN REPLY OF THE INTERVENER

1. The ACT Discrimination Commissioner (**Commissioner**) seeks leave to make supplementary submissions in response to the submissions in reply filed by the ACT Attorney-General (**Intervener**) on 25 August 2017 and emailed to the Commissioner at the close of business that day.
2. The Commissioner's submissions are made in addition to the principal submissions provided to the Tribunal on 18 August 2017. These additional submissions respond to the Intervener's submissions and seek to clarify for the Tribunal the principles relating to the operation of s 30 of the *Human Rights Act 2004* (**HR Act**), and in relation to the proper construction of s 67A of the *Discrimination Act 1991* (**Discrimination Act**).

The operation of s 30 of the HR Act following *Islam* (and *Momcilovic*)

3. The Intervener's submissions point to *Re Application for Bail by Islam* 4 ACTLR 235 (**Islam**) and *Momcilovic v The Queen* (2011) 245 CLR 1 (**Momcilovic**) to confirm that no special status can be granted to the interpretive obligation in s 30 of the HR Act (Intervener's submissions in

reply at[6]-[8])

4. The Commissioner does not contend otherwise. The Tribunal has similarly confirmed that s 30 is not a special rule of interpretation. In *Allatt & ACT Government Health Directorate* [2012] ACAT 67 (*Allat*), the Tribunal adopted the general approach to the interpretative task' under s 30 of the HR Act (which was followed by the Tribunal in *Law Society of the ACT & Treasury Directorate and NRMA Insurance* [2013] ACAT 36 and *W v Director-General, Community Services* [2015] ACAT 14):

It is now clear ... that, although the interpretive rule in s 30 of the Human Rights Act involves a process of statutory construction, it is not intended to create a “special” rule of interpretation. The Victorian Court of Appeal in *R v Momcilovic* held that the words “consistently with [its] purpose”, ins 32(1) of the *Charter of Human Rights and Responsibilities ACT 2006* (Vic) (i.e. the Victorian equivalent of s 30 of the Human Rights Act) “stamped s 32(1) with a quite different character” to s 3(1) of the UK Human Rights Act and that “the inclusion of the purpose requirement made it unambiguously clear that nothing in s 32(1) justified, let alone required, an interpretation of a statutory provision which overrode the intention of the enacting Parliament.”

The Victorian Court of Appeal’s views about the interpretive obligation in s 32(1) of the *Charter of Human Rights and Responsibilities ACT 2006* (Vic) were upheld by the High Court in *Momcilovic v The Queen (Momcilovic)*, although other aspects of the Court of Appeal’s decision were overturned. The majority of the High Court bench held that s 32(1) was an ordinary rule of interpretation. French CJ stated that that provision:

requires statutes to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights and freedoms. ... [Section 32(1) applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of

*application. The Court of Appeal was essentially correct in its treatment of s 32(1)}.*¹

5. The Tribunal in *Allatt* went on to adopt the steps proposed by Penfold J in *Islam*, which uses the approach adopted by the Victorian Court of Appeal in *Momcilovic* but has an “ACT gloss to take account of section 139 of the Legislation Act”.² Section 139 of the *Legislation Act 2001 (Legislation Act)* states that a statutory construction which best achieves legislative purpose is to be preferred to a construction which would not.
6. Accordingly, the following principles may be drawn from *Islam* and *Momcilovic*:
 - a) The meaning of the statutory provision in question must be ascertained by applying s 30 of the HR Act at the outset of the interpretive exercise, in conjunction with other relevant principles of statutory interpretation.
 - b) Compliance with the s 30 obligation means exploring all ‘possible’ interpretations of the provision in accordance with standard rules of statutory interpretation, including the presumption against interference with rights, which extends to the human rights set out in the HR Act.
 - c) A provision cannot be given a meaning that is not supported by the ordinary principles of construction to achieve or improve a provision’s compatibility with human rights.
 - d) However, when, in accordance with standard rules of statutory interpretation, a provision is capable of more than one possible meaning, s 30 requires the selection of the meaning that is most compatible with the relevant HR Act right, provided that such a meaning is also consistent with s 139 of the Legislation Act.

Proper construction of s 67A

7. Section 67A of the Discrimination Act relevantly provides that:

- (2) It is unlawful for a person to incite hatred toward, revulsion of, serious contempt for, or severe ridicule of a person or group of people on the ground of ... [(f) religious conviction], other than in private.

8. The Commissioner understands that the Intervener's preferred construction of s 67A is that it does not apply to acts, omissions, or respondents outside the ACT, including where the act of incitement takes place outside the ACT (Intervener's submissions in reply, at [11(d)], and [12]). In the terms of the question posed by the Intervener in his principal submissions at [41], this would appear to involve interpreting s 67A with the following territorially fixed components:

(1) It is unlawful for a person [**in the ACT**] to incite hatred toward, revulsion of, serious contempt for, or severe ridicule [**in the ACT**] of a person or group of people [**in the ACT**] on the ground of ... [(f) religious conviction], other than in private.

9. The Commissioner's preferred construction of s 67A is that it can apply to acts (or omissions or respondents) outside the ACT provided that some of the elements of the vilification made unlawful by s 67A occurred in or were connected with the ACT. In the context of material posted online outside the ACT, but accessed in the ACT, the Commissioner described the connection as where the material is taken to have been published in the ACT, or in other words, a sufficient connection with the ACT would render the act a relevant act committed other than in private in the ACT.
10. Such a construction is appropriate as s 67A is concerned with prohibiting vilification that is experienced in the ACT (not anywhere else), and the location of the respondent is immaterial if the relevant act achieves the prohibited result of inciting hatred, etc, in the ACT. With the exception of *Burns v Gaynor* [2015] NSWCATAD 211, the cases referred to in the Commissioner's submissions are consistent with such a construction.
11. The Commissioner's preferred construction of s 67A therefore may be

expressed as involving the following territorially fixed components:

- (3) It is unlawful for a person [**whether inside or outside the ACT**] to incite hatred toward, revulsion of, serious contempt for, or severe ridicule [**in the ACT**] of a person or group of people [**in the ACT**] on the ground of ... [(f) religious conviction], other than in private.
12. It is submitted that the Commissioner's interpretation is to be preferred to the Intervener's as it best achieves, consistent with s 139 of the Legislation Act, the legislative purpose of s 67A (to prohibit religious vilification, including through online means) as well as the objects of Discrimination Act to eliminate discrimination to the greatest extent possible, and to promote and protect the right to equality in the HR Act. Such a construction is also the least restrictive of the HR Act rights that in the Commissioner's view are relevant to this matter, namely, the right to equality (s 8), the right to reputation (s 12), the right to freedom of religion (s 14), and the right to a fair hearing (s 21).
13. With respect, the Commissioner submits that the Intervener's contention that 'a complainant in relation to acts and parties outside the ACT may seek appropriate remedies in other jurisdictions, most of which have an equivalent statute to the Discrimination Act, and provisions analogous to s 67A' (Intervener's submissions in reply at [11I]) is not sustainable as an argument in favour of a narrow construction.
14. If, on the Intervener's preferred construction, s 67A does not apply to acts, omissions or respondents outside the ACT, including an act of incitement that takes place outside the ACT, then it is not apparent how a complainant who is resident in the ACT and who is the target of vilification in the ACT by a non-ACT resident would have recourse to a remedy in another jurisdiction with a similarly narrowly constructed anti-vilification provision. The Commissioner does not understand the Intervener to be suggesting that the only critical element of liability for conduct prohibited under provisions such as s 67A is the location where the impugned act was undertaken. Further, in this instance the vilification provisions in the *NSW Anti-Discrimination Act 1977* do not extend to

prohibiting vilification on the ground of religious conviction.

15. In conclusion, the Commissioner submits that, in accordance with the correct interpretation of s 67A, it is open for the Tribunal to find that a victim of vilification can seek redress under s 67A if all or some of the elements of vilification are within the ACT but not if none of those elements are within ACT. The critical element for liability is the vilification itself, irrespective of where the act that achieved the result of vilification occurred. Such a construction should be preferred as it (i) best achieves the legislative purpose of s 67A and the objects of the Discrimination Act; (ii) best accords with the relevant HR Act rights; and (iii) does not depart from the established rules for statutory interpretation. The Commissioner submits that the Intervener's interpretation of s 67A should therefore be rejected.

Signed

Karen Toohey

ACT Discrimination Commissioner 28 August 2017

HEARING DETAILS

FILE NUMBER:	DT 4/2017
PARTIES, APPLICANT:	David Bottrill
PARTIES, RESPONDENT:	John Sunol
PARTIES, INTERVENOR	Attorney-General for the ACT
PARTIES, AMICUS CURIAE	ACT Discrimination Commissioner
COUNSEL APPEARING, APPLICANT	N/A
COUNSEL APPEARING, RESPONDENT	N/A
COUNSEL APPEARING, INTERVENOR	Ms N Tarbet
SOLICITORS FOR APPLICANT	N/A
SOLICITORS FOR RESPONDENT	N/A
SOLICITORS FOR INTERVENOR	ACT Government Solicitor
TRIBUNAL MEMBERS:	Senior Member B Meagher SC
DATES OF HEARING:	27 July 2017